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In the Supreme Court of the United States

OCTOBER TERM, 1991

ROSEMARIE CHRISTOPHERSEN,
SURVIVING SPOUSE OF ALBERT ROY CHRISTOPHERSEN,
DECEASED, AND STEVEN ROY CHRISTOPHERSEN,
PETITIONERS,

v.

ALLIED SIGNAL CORPORATION, INCO ALLOYS
INTERNATIONAL, INC., UNITED CATALYSTS, INC.,
THE HALL CHEMICAL COMPANY,
MARATHON MANUFACTURING COMPANY, AND
C.P. CHEMICALS, INC.,
RESPONDENTS.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

CLIFTON T. HUTCHINSON*
DAVID C. GODBEY
THEODORE STEVENSON, III

HUGHES & LUCE, L.L.P.
1717 Main Street, Suite 2800
Dallas, Texas 75201
(214) 939-5500

MICHAEL W. HUDDLESTON
TERESA BOHNE

COWLES & THOMPSON
4000 First RepublicBank Plaza
Dallas, Texas 75202
(214) 670-1100

Counsel of Record

Other Counsel Continued on Inside Cover

January 10, 1992

STEPHEN SCHOETTMER
JEFFERSON BALLEW
THOMPSON & KNIGHT
1700 Pacific Avenue, Suite 3300
Dallas, Texas 75201-4693
(214) 969-1700

FREDERICK DEB. BOSTWICK
ELIZABETH A. MILLER
NAMAN, HOWELL, SMITH & LEE
P.O. Box 1470
Waco, Texas 76703-1470
(817) 754-1421

MARC A. SHEINESS
KATHLEEN WALSH BIERNE
HIRSCH, GLOVER, ROBINSON
& SHEINESS
917 Franklin at Main
Houston, Texas 77002
(713) 236-7968

PAT BEARD
BEARD & KULTGEN
P.O. Box 21117
Waco, Texas 76701-1117
(817) 776-5500

QUESTION PRESENTED

Did the trial court abuse its discretion in holding that the testimony of Dr. Miller, Plaintiffs' only expert witness on causation, was inadmissible because it was based on grossly inaccurate factual assumptions regarding the decedent's exposure to nickel/cadmium, and because Dr. Miller's reasoning lacked foundation, support, and general acceptance in the medical community?

LIST OF PARTIES

1. Rosemarie Christophersen and Steven Roy Christophersen, Petitioners
2. Allied-Signal Corporation, Respondent
3. Inco Alloys International, Inc., Respondent
4. United Catalysts, Inc., Respondent
5. The Hall Chemical Company, Respondent
6. Marathon Manufacturing Company, Respondent
7. C.P. Chemicals, Inc., Respondent

LIST PURSUANT TO RULE 29.1

1. Allied-Signal Corporation has the following subsidiaries: Allied-Apical Company, Bendix Europe, S.A., Bendix Mexicana, S.A. de C.V., Ferranti plc, Financiere Allied-Signal S.A., Garrett Productos Automotrices S.A. de C.V., Garrett Turbo India, Ltd., Ruckhaltesysteme fur Fahrzeuglscherhert GmbH, BBA Group PLC, Bendix Atlantic Inflator Company, Bendix Autolite Corporation, The Bendix Corporation, Bendix Electronic Service Corporation, Bendix-Jidosha Kiki Corporation, Bendix Mintex Pacific Pty. Limited, Bendix Mintex Proprietary Limited, Bunker Ramo Electronic Data Systems S.A., Coalition Remedial Efforts, Inc., Compania Industrial de Fluorita, S.A., Compania Metalurgica de Parral, S.A., Fram Corporation, Globe Auto Electricals, Ltd. (I), Hankuk Brake Industrial Co., Ltd., Industrial Turbines International Inc., International Robomation Intel-

ligence Inc., International Technigroup Inc., International Turbine Engine Corporation (I), Jidosha Kiki Co., Ltd., JSR Allied Corporation, Leaseway All-Services, Inc., Lucky Allied Plastics Corporation, Manbritt Industries, Inc., Morton Bendix Company, Nippon Amorphous Metals Co., Ltd., Nirlon Synthetic Fibres and Chemicals, Ltd., Normalair Garrett (Holdings) Ltd., Prestolite of India Ltd. (I), Quimobasicos, S.A., Sifra Industrie, S.A., Societe d' Etudes et de Constructions Aero-Navales, Synektron Corporation, Turbodina S.A.I.Y.C., Union Texas Exploration Corporation, Union Texas International Corporation, Union Texas Petroleum Holdings, Inc, USHA Amorphous Metals Ltd. Allied Signal Corporation has no parent.

2. Inco Alloys International, Inc. owns A-1 Wire Tech, Inc. The parent of Inco Alloys International, Inc. is Inco United States, Inc., and the parent of Inco United States, Inc. is Inco Limited.
3. United Catalysts, Inc. has no non-wholly owned subsidiaries. Its parent is Sud Chemie, A.G. of Munich, Germany.
4. Hall Chemical Company has no non-wholly owned subsidiaries. The parent of Hall Chemical Company is Goldman Financial Group, Inc.
5. Marathon Manufacturing Company has no non-wholly owned subsidiaries. Its parent is the Pennsylvania Company, and the parent of the Pennsylvania Company is Penn Central Corporation.

6. C.P. Chemicals, Inc. has the following subsidiaries: Keystone Plating Supply, Inc., Seaboard Mineral Supply, Inc., Keystone Chemical Supply, Inc., Peles B.V., C.P. Sumter, Inc., C.P. Inorganics, Inc., and Chem-Ex Corp. The parent of C.P. Chemicals, Inc. is Philipp Brothers Chemicals, Inc.,

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STATEMENT OF THE CASE

Petitioners (Plaintiffs below) challenge an evidentiary determination by a federal court in a diversity case between private litigants. Plaintiffs, the survivors of Albert Roy Christophersen, brought a wrongful death action against his employer and its suppliers of nickel/cadmium products based upon alleged failure to warn. Christophersen died of colon cancer, and Plaintiffs alleged that his death was caused by the inhalation of nickel/cadmium fumes in the workplace even though no scientific study has ever linked the inhalation of nickel/cadmium to colon cancer. The only evidence

relating to causation presented by Plaintiffs was the affidavit testimony of Dr. Lawrence Miller. The district court excluded Dr. Miller's testimony due to his reliance on grossly inaccurate exposure data and lack of medical support for his methodology. Because Plaintiffs presented no other evidence on causation, the district court granted summary judgment in favor of Defendants. The Fifth Circuit originally reversed the district court, but after a rehearing *en banc*, upheld the district court's exclusion of Dr. Miller's testimony and grant of summary judgment.

A. SUMMARY OF OPPOSITION

This case is not worthy of certiorari. The primary ground for the district court's exclusion of Dr. Miller's testimony was fact-specific: he had relied upon grossly inaccurate assumptions as to the amount and duration of Christophersen's exposure to nickel/cadmium. In fact, there was no evidence that the "fumes" Christophersen was exposed to even contained nickel or cadmium. The inaccuracies and lack of foundation were the primary grounds for the district court's excluding Dr. Miller's testimony under Rules 703 and 702.

Petitioners attempt to persuade the Court that there is a split in the circuits over whether the *Frye v. United States* test of an expert's methodology has been supplanted by the Federal Rules of Evidence. The Fifth Circuit's discussion of *Frye* was a secondary, and alternate, ground for exclusion of Dr. Miller's testimony. An expert must first begin with correct factual assumptions about exposure before the accuracy of his methodology (the reasoning by which the expert links his factual assumptions to his conclusion) even matters.

Further, the circuits are not split regarding *Frye*: every circuit allows its trial courts to exclude expert opinions based upon unreliable or unsound methodology.

B. DR. MILLER'S TESTIMONY

The only evidence of causation offered by Plaintiffs was the affidavit of Dr. Lawrence Miller, a clinical pharmacologist at Tufts University. Dr. Miller neither treated Christophersen nor visited his work environment; rather, his assumptions regarding Christophersen's alleged exposure to nickel/cadmium were based solely on the affidavit of Edgar Manoliu, one of Christophersen's co-workers. The substance of that affidavit was that Manoliu occasionally saw "clouds" of vapor rising from soaking pits, which were vats in a manufacturing area separate from Christophersen's office. Manoliu's affidavit speculated that these "clouds" contained some form of nickel/cadmium. In his subsequent deposition, Manoliu, who has no training in chemistry, unequivocally admitted that he had no knowledge of what chemicals were actually present in the soak pits or whether they were even capable of releasing nickel/cadmium in vaporous form. For all Manoliu knew, the clouds could have been merely water vapor released from the hot soaking pits.

At his deposition Manoliu also corrected several inaccuracies in his affidavit that had drastically overstated the frequency and duration of Christophersen's exposure to the "vapors" in the soak pit area. Dr. Miller not only rendered his opinion based on Manoliu's admittedly incorrect affidavit, but he never revised or reformulated

his opinion to account for the inaccuracies in the exposure information admitted by Manoliu.[1]

C. DISTRICT COURT OPINION

The district court held Dr. Miller's testimony inadmissible because: (i) there was no evidence that Christophersen was even exposed to nickel/cadmium fumes, A72; (ii) even if Christophersen were exposed to nickel/cadmium, Dr. Miller's assumptions regarding the duration and level of exposure were grossly inaccurate, A72; (iii) even if Dr. Miller had relied on correct exposure data, his reasoning was not supported by any epidemiologic or animal studies, or scientific literature, A73-74; and (iv) the evidence would be unfairly prejudicial, A74. Because Plaintiffs offered no other evidence of causation, the district court granted Defendants' motion for summary judgment after discovery had concluded.

D. FIFTH CIRCUIT OPINION

The original opinion of the Fifth Circuit summarily reversed the district court decision without oral argument. The Fifth Circuit granted rehearing *en banc*, and reversed the panel decision by a nine-to-four vote. The *per curiam* opinion, joined by eight of the judges, is based on the district court's findings that Dr. Miller's opinion testimony lacked both a factual and scientific foundation.

---

[1] The Fifth Circuit noted that "Dr. Miller over-estimated the duration of Christophersen's exposure by approximately fifty percent." A11.

1. Dr. Miller's Opinion Was Not Factually Supported

The Fifth Circuit critically analyzed Dr. Miller's premise that Christophersen had a "twenty year history of 'extensive exposure to nickel and cadmium fumes in the workplace.' " Manoliu's affidavit, from which Dr. Miller drew virtually all of the factual data concerning Christophersen's exposure, was inaccurate and incomplete. The Fifth Circuit noted that the Manoliu affidavit was

> devoid of any information about the type of fumes to which Christophersen was exposed or the type of fumes generated by the battery manufacturing process. We find particularly telling Manoliu's admission in his deposition that he did not know the chemical composition of the fumes nor the mix of chemicals in the impregnation and soak tanks.

A11.

Further, the *en banc* court agreed with the district court's finding that the Manoliu affidavit overestimated the number of times per week Christophersen visited the manufacturing area, as well as the average length of time he would remain on each visit. The effect of these errors alone was to overestimate Christophersen's exposure, if any, by approximately fifty percent. A11. Dr. Miller did not base his opinion on the type of facts relied upon by other experts in the field as required by Rule 703. A12-13. In addition, Dr. Miller's opinion did "not advance the express goal of 'assisting the trier of fact' under Rule 702." The Fifth Circuit *en banc* therefore held that the district court did not abuse its discretion by excluding his testimony pursuant to Rule 703, or alternatively, Rule 702. A13.

2. Dr. Miller's Methodology Was Not Scientifically Supported

Even if Dr. Miller's factual assumptions had been correct, his reasoning did not follow a reliable or generally accepted methodology. The *en banc* court pointed to Dr. Miller's admission that the types of evidence used to establish causation are human epidemiologic studies, live animal testing, and in vitro testing. Yet Dr. Miller was unable to identify one epidemiologic, animal, or in vitro study supporting his conclusion. The *en banc* court upheld the district court's factual finding that "it was inconsistent for Dr. Miller, on one hand, to conclude that these are the main methodologies, and on the other hand, to concede that he did not effectively rely on any of them." A14. Thus, even if Dr. Miller had relied on accurate exposure information, his complete failure to apply a generally accepted methodology was an appropriate alternative ground for excluding his testimony.

REASONS FOR DENYING THE WRIT

A. THIS CASE DOES NOT PRESENT ISSUES WORTHY OF CERTIORARI

1. This Case Presents A Fact-Specific Issue

The primary basis for the Fifth Circuit's holding was that there was no evidence that the "fumes" contained nickel/cadmium, and even if they did, Dr. Miller's assumptions regarding duration and level of exposure were grossly inaccurate. Dr. Miller did not base his opinion on facts "of a type reasonably relied upon by experts in the particular field," and further, his testimony was so divorced from reality that it could not "assist the trier of fact." The district court properly excluded the testimony in accordance with the plain meaning of Rule 703, or alternatively, Rule 702. Granting certiorari to review this fact-specific determination is not the best use of this Court's limited resources.

2. The *En Banc* Opinion Does Not Create A General Test

Petitioners overstate the scope and nature of the holding by the Fifth Circuit. The Fifth Circuit took this case *en banc* to reverse the panel on the facts. That the Fifth Circuit issued a *per curiam* opinion is a strong signal of its limited intent, as it is unusual for the Fifth Circuit to issue a *per curiam* opinion in a case considered *en banc*. In fact, the *en banc* opinion expressly disclaims any intent to create a fixed test: "[w]e list these inquiries, but in doing so we do not intend that they be applied mechanically. At the same time, they often will lend themselves to sequential application. The reality is that trials are too varied for fixed molds; we construct none today." A5. After its review of the particular facts in this case, the court concluded that the district court did not abuse its discretion.

3. Proposed Revisions to Fed. R. Evid. 702 May Limit Any Precedential Value Of This Case

The Committee on Rules of Practice and Procedure of the Judicial Conference of the United States is currently considering a proposed revision to Fed. R. Evid. 702. The proposed revision reads as follows:

> ~~If~~ Testimony providing scientific, technical, or other specialized ~~knowledge~~ information, in the form of an opinion or otherwise, may be permitted only if (1) the information is reasonably reliable and will substantially assist the trier of fact to understand the evidence or to determine a fact in issue, and (2) the ~~a~~ witness is qualified as an expert by knowledge, skill, experience, training, or education to provide such testimony. ~~may testify thereto in the form of an opinion or otherwise~~.

The Committee Notes to the proposed revision state that it is "intended to limit the use, but increase the utility and reliability, of party-initiated opinion testimony bearing on scientific and technical issues." Commentary to Proposed Fed. R. Evid. 702. If promulgated, its effect would be to allow courts to "reject testimony that is based upon premises lacking any significant support and acceptance within the scientific community, or that otherwise would be only marginally helpful to the fact-finder." *Id.*

If the revisions to Rule 702 become effective, they will eliminate any precedential value of this case. Even if this Court were to grant certiorari and issue an opinion on the scope of Rules 702 and 703, it may be called on promptly to reconsider its ruling if the revisions become effective.

4. The Procedural Posture of This Case Renders Certiorari Unwise

Petitioners create the false impression of a split among the circuits over the continued vitality of *Frye v. United States*, 293 F.2d 1013 (D.C. Cir. 1923). However, for the Court to reach the *Frye* issue in this case, it must first consider and hold that Dr. Miller's testimony was admissible under Rules 702 and 703, notwithstanding the gross inaccuracies in his factual assumptions. Only then would the Court need to consider whether defects in his methodology, or reasoning process, whereby nickel/cadmium is capable of causing small-cell colon cancer, are a ground for exclusion. A multitude of previous cases have framed the *Frye* issue more cleanly, and undoubtedly more will arise in the future. If certiorari is warranted regarding the continued vitality of *Frye*, it should be granted another

day — in a case in which the *Frye* issue will be necessarily and directly addressed.

5. The Court Should Not Grant Certiorari to Make Semantic Distinctions

Petitioners urge that the plain meaning of Rule 703 does not support exclusion of Dr. Miller's testimony. Yet, they do not argue that Rule 702 does not permit exclusion of expert testimony that is based on inaccurate factual assumptions as not helpful to the trier of fact. Apparently, Petitioners' real complaint is that the Fifth Circuit cited the wrong rule in support of a valid principle. Respondents believe the plain meaning of Rule 703 supports the district court's decision, but in any event, there is no compelling need to grant certiorari in this case merely to point out that Rule 702 is a better vehicle than Rule 703 for excluding Dr. Miller's testimony.

6. The Court Has Previously Determined That the Issues Raised Here Do Not Merit Certiorari

On several occasions, the Court has had the opportunity and has declined to consider the issues raised by Petitioners. For instance, the Court has previously refused to consider whether the *Frye* test is incorporated into Rule 702, or was overruled by the Federal Rules of Evidence. *See United States v. Mustafa*, 22 M.J. 165 (C.M.A.), *cert. denied*, 479 U.S. 953 (1986); *United States v. Shorter*, 809 F.2d 54 (D.C. Cir.), *cert. denied*, 484 U.S. 817 (1987). In the five years since certiorari was denied in *Mustafa*, a version of the *Frye* test has been repeatedly applied as part of the "assistance" requirement of Rule 702, indicating an apparent consensus in the circuits on the issue. *See, e.g., Barrel of Fun, Inc. v. State Farm Fire*

& Casualty Co., 739 F.2d 1028, 1031 n.9 (5th Cir. 1984); *United States v. McBride*, 786 F.2d 45, 49 (2d Cir. 1986); note 4, *infra*. Thus, nothing has changed since *Mustafa* to render the issue more worthy of review.

The Court has also previously declined to address whether Rule 703 authorizes the exclusion of expert testimony that is founded on incorrect factual assumptions. *See Pennsylvania Dental Ass'n v. Medical Service Ass'n of Pennsylvania*, 745 F.2d 248 (3d Cir. 1984), *cert. denied*, 471 U.S. 1016 (1985) (expert testimony on definition of appropriate market in an antitrust case excluded because expert relied on factual assumptions not supported by the record). This refusal is well-founded, as each circuit agrees that expert testimony that is based on incorrect facts can be excluded. *See* note 3, *infra*.

7. There Is No Split in the Circuits

a. The Circuits Uniformly Exclude Testimony that Is Unsupported or Based On Incorrect Facts

Petitioners have tried to manufacture a split in the circuits where none exists. Each circuit has held that expert testimony based on fundamentally incorrect or unsupported facts should be

excluded.[2] These cases all employ a common-sense, fact-specific analysis.

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[2] **First Circuit**: *Larue v. National Union Electric Corp.*, 571 F.2d 51, 58 (1st Cir. 1978) (exclusion of medical expert's testimony where no basis in record for facts upon which opinion was based).

Second Circuit: *Shu Tao Lin v. McDonnell Douglas Corp.*, 742 F.2d 45, 48-49 (2d Cir. 1984) (new trial granted because expert's projection of future income should have been excluded under Rule 703 as it was based on "contradictory factual assumptions while others were utterly unsupported by the record."); *Shatkin v. McDonnell Douglas Corp.*, 727 F.2d 202, 208 (2d Cir. 1984) (affirming district court's exclusion of expert economist's testimony due to "unrealistic and contradictory" factual assumptions).

Third Circuit: *Genty v. Resolution Trust Co.*, 937 F.2d 899, 917-18 (3d Cir. 1991). (toxicologist's opinion that plaintiffs' health problems were caused by exposure to toxic landfill excluded because he did not investigate "odors" in plaintiffs' residence or personally observe their symptoms).

Fourth Circuit: *Newman v. Hy-Way Heat Systems, Inc.*, 789 F.2d 269, 271 (4th Cir. 1986) (expert opinion excluded because it was based upon speculative assumption rather than facts: "Nothing in the Rules . . . permit[s] experts to speculate in fashions unsupported by, and in this case indeed in contradiction of, the uncontroverted evidence in the case.").

Fifth Circuit: *Viterbo v. Dow Chemical Co.*, 826 F.2d 420, 422 (5th Cir. 1987) (fundamentally unsupported opinion offers no expert assistance).

Sixth Circuit: *Calhoun v. Honda Motor Co.*, 738 F.2d 126, 131-32 (6th Cir. 1984) (judgment notwithstanding the verdict granted to defendant because plaintiff's experts made the unsupported assumption that a motorcycle's brakes were wet); *Drayton v. Jifee Chemical Corp.*, 591 F.2d 352, 364 (6th Cir. 1978) (damage award by trial court revised because it was based on economist's testimony containing "astronomical projections and assumptions.")

Seventh Circuit: *Kenosha Liquor Co. v. Heublein, Inc.*, 895 F.2d 418, 419-20 (7th Cir. 1990) (plaintiff's expert's opinion "worthless" because it was not based on proper data); *Olympia Equipment Leasing v. Western Union Telegraph*, 797 F.2d 370, 382-83 (7th Cir. 1986), *cert. denied*, 480 U.S. 934 (1987) (lost profit testimony that "bore no relation to Olympia's internal business planning or to economic reality" held insufficient to support a verdict).

Petitioners cite several cases they contend reject the Fifth Circuit's holding that factually unsupported expert testimony can be excluded. Petition at 21-22. However, these cases have nothing to do with the admissibility of factually unsupported testimony; rather, they merely state that Rule 703 allows an expert to rely on inadmissible evidence when rendering an opinion. *See, e.g., Mannino v. International Manufacturing Co.*, 650 F.2d 846, 851 (6th Cir. 1981). The question in this case is whether Dr. Miller relied on the type of data normally used by experts in the field, and no circuit has ever held that an expert may reasonably rely on such grossly incorrect or unsupported factual assumptions.

b. The Circuits Are Not Split Over the Applicability of *Frye*-type Methodological Tests

Petitioners again create an illusory conflict among the circuits on the issue of whether a court may exclude expert testimony based

Eighth Circuit: *Faries v. Atlas Truck Body Manufacturing Co.*, 797 F.2d 619, 623-24 (8th Cir. 1986) (testimony of police accident investigator held inadmissible because there were "neither sufficient facts in evidence nor evidence found by [the investigator] . . . to take his opinion out of the realm of guesswork and speculation").

Ninth Circuit: *McGlinchy v. Shell Chemical Co.*, 845 F.2d 802, 806-07 (9th Cir. 1988) (summary judgment granted after exclusion of expert opinion based on "unsupported assumptions and unsound extrapolation").

Tenth Circuit: *Lima v. United States*, 708 F.2d 502 (10th Cir. 1983) (expert opinion excluded in a swine-flu vaccine case where unreliable information relied on by expert).

Eleventh Circuit: *Hull v. Merck & Co*, 758 F.2d 1474, 1477 (11th Cir. 1985) (expert opinion that exposure to benzene caused plaintiff's leukemia excluded because the expert assumed "significant" toxic exposure, though the evidence was only of trace amounts of benzene).

D.C. Circuit: *Merit Motors, Inc. v. Chrysler Corp.*, 569 F.2d 666, 672-73 (D.C. Cir. 1977) (expert opinion in antitrust case excluded when based on unsupported assumptions about demand in various markets).

upon methodology that is unreliable or unaccepted in the relevant scientific community. There is no split on this issue: whether *Frye* is explicitly cited or not, each circuit instructs its trial courts to evaluate the soundness of an expert's reasoning and analysis, and to exclude untrustworthy testimony.[3]

[3] **First Circuit:** *Lynch v. Merrell-National Laboratories*, 830 F.2d 1190, 1194-95 (1st Cir. 1987) (expert testimony inadmissible after a critical analysis of the experts' methodologies and the lack of peer-review of proffered studies).

Second Circuit: *United States v. McBride*, 786 F.2d 45, 49 (2d Cir. 1986) ("Expert testimony must be based upon a reliable area of expertise, as has come to be embodied in the rule associated with *Frye v. United States.*").

Third Circuit: *DeLuca v. Merrell Dow Pharmaceuticals, Inc.*, 911 F.2d 941, 956 (3d Cir. 1990) ("the district court is permitted to identify relevant scientific communities and make determinations about the degree of acceptance of [plaintiff's expert's] methodology within those communities").

Fourth Circuit: *Ellis v. International Platex, Inc.*, 745 F.2d 292, 304 & n.15 (4th Cir. 1984) (specifically continuing to recognize the validity of the *Frye* test).

Fifth Circuit: *Barrel of Fun, Inc. v. State Farm Fire & Casualty Co.*, 739 F.2d 1028 (5th Cir. 1984) (using *Frye* test to hold inadmissible a voice-stress analysis process).

Sixth Circuit: *United States v. Metzger*, 778 F.2d 1195, 1203 (6th Cir. 1985), *cert. denied*, 477 U.S. 906 (1986) ("[this circuit] still predicate[s] the admission of scientific evidence on general acceptance in the community").

Seventh Circuit: *United States v. Smith*, 869 F.2d 348, 351 (7th Cir. 1989) ("this circuit has continued to affirm (and to apply) the *Frye* standard").

Eighth Circuit: *United States v. Two Bulls*, 918 F.2d 56, 60 n.7 (8th Cir. 1990) (refusing to reject use of *Frye* in evaluation of "the admissibility of any questionable opinion evidence")

Ninth Circuit: *United States v. Gillespie*, 852 F.2d 475, 481-82 (9th Cir. 1988) (criminal conviction reversed because testimony of child therapist relating to child's behavior with anatomically correct dolls did not satisfy the *Frye* standard).

Petitioners cite *United States v. Downing*, 753 F.2d 1224, 1232-37 (3d Cir. 1985), as rejecting *Frye* and thus creating a split in the circuits. Although *Downing* rejected the specific verbal formulation established in *Frye*, it nonetheless directs courts to inquire into "the soundness and reliability of the technique used." *Downing*, 753 F.2d at 1237; *see also United States v. Dowling*, 855 F.2d 114 (3d Cir. 1988), *aff'd*, 493 U.S. 342 (1990).

As part of its inquiry into reliability, the trial court is permitted to consider "explicit identification of a relevant scientific community and an express determination of a particular degree of acceptance within that community." *Id.* at 1238.[4] *Downing* and subsequent Third Circuit cases have not eliminated the inquiry into whether an

Tenth Circuit: *Head v. Lithonia Corp., Inc.*, 881 F.2d 941, 943-44 (10th Cir. 1989) (expert opinion based on topographical brain mapping excluded because technique was relatively experimental and not generally accepted).

Eleventh Circuit: *United States v. Piccinonna*, 885 F.2d 1529, 1531 & 1536 (11th Cir. 1989) (*Frye* limits, though does not bar, the admission of polygraph evidence in criminal trials).

D.C. Circuit: *United States v. Shorter*, 809 F.2d 54, 59-61 (D.C. Cir.), cert. denied, 484 U.S. 817 (1987) ("*Frye* is still the law of this Circuit.")

[4] The Third Circuit explained the slight difference between its test and *Frye*:

> The reliability inquiry that we envision is flexible and may turn on a number of considerations, in contrast to the process of scientific "nose-counting" that would appear to be compelled by a careful reading of *Frye*.
>
> * * *
>
> Thus we expect that a technique that satisfies the *Frye* test usually will be found to be reliable as well. On the other hand, a known technique which has been able to attract only minimal support within the community is likely to be found unreliable.

Downing, 753 F.2d at 1238.

expert's methodology is generally accepted. Rather, the Third Circuit has semantically repackaged the methodological and general acceptance inquiries within the term "reliability."

Nor does *In re Paoli R.R. Yard PCB Litigation*, 916 F.2d 857 (3d Cir. 1990), *cert. denied*, 111 S. Ct. 1584 (1991), reject methodological inquiries. In *Paoli*, defendants challenged the admissibility of a meta-analysis in a PCB case. On appeal of the trial court's exclusion of the expert testimony, one factor the Third Circuit considered was the extent to which the expert's meta-analysis had been peer-reviewed. *Id.* at 858. Whether the meta-analysis was peer reviewed is a factor in determining if the expert's methodology is sound and generally accepted. Thus, *Paoli* engaged in an analysis of methodologic acceptance. Although the Third Circuit reversed the trial court's determination, the basis for reversal was that the trial court failed to make sufficiently specific findings in support of its conclusion.

Perhaps the best example of the Third Circuit's thinking on this issue is the recent case of *DeLuca v. Merrell Dow Pharmaceuticals, Inc.*, 911 F.2d 941 (3d Cir. 1990). In *DeLuca*, the trial court granted summary judgment after holding expert testimony on causation inadmissible. As in *Paoli*, the Third Circuit reversed the trial court's exclusion of the expert testimony due to its "cursory ruling" that was "not predicated upon a record-supported, factual finding." *Id.* at 953. Importantly, the Third Circuit remanded the admissibility issue for redetermination, and in so doing, instructed the district court to "identify relevant scientific communities and make determinations about the degree of acceptance of [the expert's] methodology within

those communities." *Id.* at 956. Petitioners imply that there is a deep chasm between the Third Circuit and the rest of the circuits, but in reality the only difference is one of semantics.

B. THE FIFTH CIRCUIT'S DECISION TO EXCLUDE DR. MILLER'S TESTIMONY WAS APPROPRIATE UNDER RULE 703

1. Dr. Miller Relied Upon Grossly Incorrect Factual Assumptions

One of the independent grounds on which the district court excluded Dr. Miller's testimony was that his opinion was not based on accurate information regarding Christophersen's exposure to nickel/cadmium. The trial court found that Dr. Miller relied on admittedly erroneous statements in the affidavit of one of Christophersen's co-workers, Edgar Manoliu, in determining whether Christophersen was exposed to nickel/cadmium. A71; Miller Depo. at I — 216. In his deposition, Manoliu recanted much of what was in his affidavit relating to the duration and extent of Christophersen's exposure. Thus, unknown to Dr. Miller, the "facts" concerning the degree of Christophersen's exposure to nickel/cadmium upon which Dr. Miller relied in forming his opinion were incorrect, and therefore rendered his opinion inapplicable to the case at hand.

a. There Is No Evidence that the "Fumes" Even Contained Nickel or Cadmium.

The trial court found that Dr. Miller had no personal knowledge of the composition of compounds to which Christophersen was allegedly exposed. A71-72. Though Dr. Miller assumed that the "clouds" to which Christophersen was exposed contained nickel and/or cadmium, this assumption was based solely on speculation

by Manoliu in his Affidavit that the fumes contained nickel and/or cadmium. *Id.* Dr. Miller offered no opinion or testimony that the chemical compounds in the soaking pits were capable of releasing nickel or cadmium fumes; indeed, Dr. Miller did not even know the chemical makeup of the compounds in the soaking pits. A72.

Manoliu's Affidavit states that "Christophersen would regularly and daily be exposed to fumes and airborne particles created by the manufacturing process. These materials again included particles from nickel and cadmium alloys." Manoliu Affidavit at 2. When asked in his subsequent deposition how he knew that the fumes contained nickel and/or cadmium, Manoliu admitted that he did not really know the composition of the fumes. In fact, Manoliu did not even know the mix of chemicals in the impregnation and soak tanks. He did, however, know that the vats contained a heated liquid solution including, among other constituents, nickel and cadmium, and that they emitted clouds of vapor. Manoliu Depo. at 46. Manoliu noticed clouds of vapor being emitted from the soak baths, and simply assumed that the vapor was nickel and cadmium fumes.

Manoliu's Affidavit was the only evidence tending to indicate that the vapors in the soak room contained nickel and/or cadmium, and Manoliu admits that he did not have knowledge of this fact, but merely speculated about it. Manoliu is not a chemist, and his guess that fumes allegedly coming from the tank were nickel or cadmium, rather than simply water vapor, cannot form a proper basis for the assumptions underlying an expert opinion.

b. Dr. Miller Relied on Factual Inaccuracies that Drastically Overstated Christophersen's Exposure.

Dr. Miller stated in his affidavit that "Mr. Christophersen had approximately a twenty year history of employment with Marathon Battery Company which included extensive exposure to nickel and cadmium fumes in the workplace." Miller Affidavit at 2. Dr. Miller assumed that "[f]rom 1972 to 1980, [Christophersen] regularly visited the impregnation and soak area in the plant . . . From 1980 to 1986, his office was in the main production building, and he continued to visit the impregnation and soak area several times per week . . ." Miller Report at 1. Manoliu testified in his deposition, however, that the soak room in the Waco plant was not even opened until 1978-79; therefore, Christophersen could not have been exposed to nickel or cadmium until 1978 or 1979. Manoliu Depo. at 133-34. Dr. Miller assumed that from 1972 to 1980 Christophersen regularly visited the impregnation and soak area for up to one hour several times per week, yet as Manoliu admits, that assumption was physically impossible. The district court correctly found that Dr. Miller's opinion was based on six or seven years of exposure that never occurred. A72.

Dr. Miller further assumed that Christophersen's visits to the impregnation and soak area of the plant were "for up to 1 hour at a time several times per week." Miller Report at 1. Manoliu testified, however, that the only times Christophersen came down to the process area (where the impregnation and soaking tanks were located) were when he escorted a tour, on average once or twice per week. Manouliu Depo. at 45-46. When he visited the process area,

the time he spent varied, with a maximum of one-half hour. Manoliu Depo. at 45-46. Occasionally Christophersen would visit the process room to ask Manoliu a question; this occurred only once or twice a month and never lasted longer than fifteen minutes. *Id.* Thus, the district court correctly found that Dr. Miller's assumption that Christophersen visited the impregnation and soak area several times per week for up to one hour is factually incorrect. A71-72.

c. Dr. Miller Admits That Exposure Levels Are An Important Variable in Determining Causation

Generally, the chance of developing a response to a toxin increases with higher concentration and longer periods of exposure. *See* Rudders Affidavit; Weisburger Affidavit. Dr. Miller testified in his deposition that dose is an important consideration when evaluating exposure to a toxic substance, and that there is a dose-response effect for heavy metals in terms of their carcinogenicity. Miller Depo. at I-56-57, 64. The trial court found that the level of exposure "is an important consideration when evaluating exposure to a toxic substance, as admitted by Dr. Miller." A72. Thus inaccuracies, or total lack of information as here, render an evaluation unfounded or impossible.

2. Expert Testimony Based On Inaccurate Factual Assumptions Is Properly Excluded Under Rule 703

Rule 703 provides that:

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. *If of a type reasonably relied upon by experts in the particular field* in

forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

Fed. R. Evid. 703 (emphasis supplied).

By the plain meaning of Rule 703, if a party provides hearsay or other inadmissible information to an expert out of court, the expert may base his opinion on that information only if other experts in the field reasonably rely on that type of information. Plaintiffs provided Dr. Miller with Manoliu's Affidavit, which is an inadmissible, out-of-court statement. *See, e.g., Spivey v. United States*, 912 F.2d 80, 85 (4th Cir. 1990); *Roberts v. Harnischfeger Corp.*, 901 F.2d 42, 44-45 (5th Cir. 1989); A18. Whether inadmissible background evidence, like Manoliu's Affidavit, is of the type reasonably relied upon by experts in the field is a question of fact for resolution by the trial judge under Fed. R. Evid. 104(a), which provides that in making such preliminary determinations the court "is not bound by the rules of evidence except those with respect to privilege." *Head v. Lithonia Corp.*, 881 F.2d 941, 943-44 (10th Cir. 1989); *In re Agent Orange Product Liability Litig.*, 611 F. Supp. 1223, 1246 (E.D.N.Y. 1985), *aff'd*, 918 F.2d 187 (2d Cir. 1977), *cert. denied*, 487 U.S. 1234 (1988)(no need for a full Rule 104(a) hearing, since the court "takes judicial notice — based on hundreds of trials — that no reputable physician relies on hearsay checklists by litigants to reach a conclusion with respect to the cause of their afflictions.").

The district court made detailed findings pursuant to Rule 104(a) and found that "there is no indication as to what specific substances Christophersen was exposed to or in what amount." A72. The court further concluded that Dr. Miller could not have reliably

based his opinion on the information contained in the Manoliu Affidavit. A71-72. On this basis, the district court concluded that "Dr. Miller's testimony should be stricken as it is not based upon the type of evidence usually relied upon by experts in the field of cancer research." A74. Petitioners make no suggestion that this finding is incorrect or an abuse of discretion.

Petitioners boldly state that there is no way of reading Rule 703 to allow for the exclusion of unfounded expert opinions. Petition at 21. This statement goes entirely too far, and in the process contorts the plain meaning of Rule 703. The Fifth Circuit did not uphold the exclusion of Dr. Miller's testimony under Rule 703 because of defects in his methodology (the analysis by which he links the facts to the ultimate conclusion). Rather, the basis for excluding Dr. Miller's affidavit under Rule 703 was his failure to start with a set of facts that bore any semblance to reality. Medical doctors (or any other type of expert for that matter) do not reasonably rely on grossly inaccurate information of exposure and dosage in rendering an opinion.

Once the district court found that medical doctors do not reasonably rely upon the type of incorrect facts presented by Manoliu, Dr. Miller's testimony was appropriately excluded under Rule 703. The Advisory Committee Note to Rule 703 supports this common sense, plain meaning interpretation to exclude such expert opinions: "[t]he language would not warrant admitting in evidence the opinion of an 'accidentologist' as to the point of impact in an automobile collision based on statements of bystanders, since this requirement is not satisfied." Fed. R. Evid. 703, Advisory Commit-

tee Note. The Note further states that the purpose of Rule 703 is to bring judicial practice "into line with the practice of the experts themselves when not in court." *Id.* Obviously, few medical doctors base a diagnosis on incorrect facts derived from the speculation of a co-worker.

C. ALTERNATIVELY, THE TRIAL COURT'S EXCLUSION OF DR. MILLER'S TESTIMONY WAS WITHIN THE SCOPE OF RULE 702

Rule 702 provides that expert testimony is admissible if it will "assist the trier of fact." Fed. R. Evid. 702. Expert testimony based on grossly incorrect factual assumptions cannot assist the trier of fact and, indeed, can only sow confusion. Although the Fifth Circuit *en banc* primarily discussed Rule 703 as its ground for exclusion, it specifically addressed Rule 702 as an alternate basis for exclusion: "an opinion based totally on incorrect facts will not speak to the case at hand and hence will be irrelevant. In any event, such an opinion will not advance the express goal of 'assisting the trier of fact' under Rule 702." A13.

Federal courts have uniformly held inadmissible expert testimony based upon factual assumptions not supported by the record. *See* note 3, *supra*. Although most courts have held that such testimony is properly excluded under Rule 703, other courts have engaged in the same factual analysis, yet have expressed their holdings under Rule 702 by stating that expert testimony based upon incorrect facts does not "assist the trier of fact."[5]

[5] *See, e.g., Viterbo v. Dow Chemical Co.*, 826 F.2d 420, 422 (5th Cir. 1987) ("If an opinion is fundamentally unsupported, then it offers no expert assistance to the jury."); *Sterling v. Velsicol Chemical Corp.*, 855 F.2d 1188, 1208-09 (6th Cir. 1988).

It is also conceivable that, as the *en banc* court mentions, expert testimony might be excluded on grounds of relevance if it is "based on facts that are indisputedly wrong," A13, for example, that the plaintiff was exposed to dioxin when he was actually exposed to formaldehyde. Regardless which rule is expressly cited, the circuits are unanimous in their exclusion of factually unsupported expert testimony. The inquiry in each case is the same: did the expert rely on facts that were reasonably correct? The only difference is the rule — 702 or 703 — that supports the analysis. Semantic distinctions such as this should not be the basis for certiorari.

D. RULE 702 PERMITS INQUIRY INTO WHETHER AN EXPERT'S REASONING AND METHODOLOGY IS GENERALLY ACCEPTED

The *Frye* analysis undertaken in the *en banc* opinion was not necessary to the holding. The primary ground for the holding was that Dr. Miller relied on incorrect factual assumptions, mandating his exclusion under Rules 703 and 702. The *Frye* test concerns an expert's methodology — in other words, the means by which the expert links the facts to the ultimate conclusion. Analysis of Dr. Miller's methodology is necessary only if Dr. Miller began with correct facts. Thus, the *en banc* court's *Frye* analysis was merely an alternative ground for exclusion.

The *Frye* test asks whether, in reaching a conclusion, the expert has used a well-founded methodology, one "sufficiently established to have gained general acceptance in the particular field in which it

belongs." *Frye*, 293 F.2d at 1014. Dr. Miller opined that Christophersen's death was caused by colon cancer that metastasized to his liver. The basis of Defendants' *Frye* challenge to Dr. Miller's testimony was that no scientific studies or medical literature showed that inhaling of nickel/cadmium fumes causes small-cell colon cancer.

The district court, based upon admissions by Dr. Miller in his deposition, found that causation must be established through epidemiologic, animal, or in vitro studies. A73. Dr. Miller admitted, however, that he was not aware of any animal or in vitro studies linking nickel/cadmium to small-cell colon cancer. *Id.* Although Dr. Miller cited two epidemiologic studies that he reviewed, neither study drew any conclusion linking nickel or cadmium to colon cancer. A74.[6] Dr. Miller presented a theory of how inhalation of nickel/cadmium might cause a small-cell colon cancer, but this theory was not based on and had no support in scientific studies or the medical literature. *Id.* Defendants produced affidavits of several experts, whose qualifications were unchallenged, that stated Dr. Miller's theory is "without precedent in cancer epidemiology and is not scientifically correct." A73.

Petitioners suggest that any inquiry into an expert's methodology is precluded because it is not specifically contemplated by the Federal Rules. Petition at 16-19. In their haste to craft a "plain meaning" argument, Petitioners ignore the language of Rule 702,

[6] Dr. Miller also tendered numerous epidemiologic studies, none of which showed a link between nickel/cadmium exposure and colon cancer. Miller Depo. at I — 85-87, 89-90, 206, II — 83, 87.

which provides for admission of expert testimony only if it will "assist the trier of fact." The district court makes the initial determination of assistance under Rule 104(a), which expressly permits the trial court to go beyond the rules of evidence. Thus, contrary to Petitioners' views, *Frye* is not obsolete because it is not specifically mentioned in the Federal Rules of Evidence. Quite the opposite, the plain language of the rules invites tests such as *Frye* in making preliminary determinations of admissibility under the helpfulness standard of Rule 702. As the trial court and Fifth Circuit *en banc* held, expert testimony, like Dr. Miller's, that is completely unsupported by the medical community offers no assistance to the trier of fact, and has the counterproductive effect of causing confusion.

Any contrary reading of the Rules would lead to absurd results. An expert witness must have more than mere credentials and a subjective opinion that he is willing to voice in court. *See Viterbo v. Dow Chemical Co.*, 826 F.2d 420, 421 (5th Cir. 1987). Petitioners' position that the text of the Federal Rules precludes inquiry into an expert's methodology allows no compromise. Were the Court to adopt that position, it would be impossible to exclude an astrologer's testimony that the stars indicate that the cause of a plaintiff's injuries was the defendant's product, as long as the astrologer had proper credentials in astrology and relied on the correct birthdate.[7]

[7] Indeed, given the extreme interpretation of Rule 703 urged by Petitioners, it seems they would have difficulty articulating a basis for excluding an astrologer who used the wrong birthdate for the plaintiff.

Such a ridiculous result underscores the extremity of Petitioners' position, and reinforces the logic and common-sense of the circuits that have read Rule 702 to incorporate a generally accepted methodology requirement.[8] Importantly, the district court and the Fifth Circuit did not hold that Dr. Miller's conclusion was incorrect, as implied by Petitioners, but that his methodology was not sufficiently reliable or accepted to justify its admission before a jury. All experts agreed that a correct methodology requires support in studies or medical literature, which Dr. Miller simply did not have.

E. APPLICATION OF THE FEDERAL RULES OF EVIDENCE DOES NOT VIOLATE THE ERIE DOCTRINE OR THE SEVENTH AMENDMENT

Petitioners assert that the Fifth Circuit's application of the Federal Rules of Evidence, and in particular Rule 703, "strikes at the heart" of *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938); Petition at 29. The basis of this argument is that the result of this case will affect "outcomes in toxic tort cases," A53, thus "destroying the substance of Texas law." Petition at 29. This argument ignores Rules 702 and 703 of the Texas Rules of Civil Evidence, which track verbatim their federal counterparts. It also ignores the abandonment long ago of the "outcome determinative" test for substantive rules announced by Justice Frankfurter in *Guaranty Trust Co. of New York v. York*, 326 U.S. 99 (1945). *Hanna v. Plumer*, 380 U.S. 460 (1965). Similar holdings excluding expert testimony under Rule 703 have been upheld against *Erie* challenges. *Richardson v. Richard-*

[8] *See, e.g. United States v. McBride*, 786 F.2d 45, 49 (2d Cir. 1986); *United States v. Two Bulls*, 918 F.2d 56, 60 (8th Cir. 1990).

son-Merrell, Inc., 857 F.2d 823, 830 (D.C. Cir.), *cert. denied*, 493 U.S. 882, 110 S. Ct. 218 (1989); *Ealy v. Richardson-Merrell, Inc.*, 897 F.2d 1159, 1161 (D.C. Cir.), *cert. denied*, 111 S. Ct. 370 (1990). This argument, which is raised for the first time in the Petition, does not warrant certiorari.

Petitioners' assertion that their Seventh Amendment rights have been violated by the entry of summary judgment is equally meritless. Once the trial court made the evidentiary decision to exclude Dr. Miller's testimony, no genuine issue of material fact existed on the issue of causation. It has been long settled that a party has a right to a jury trial only when there first exists an issue of fact to be determined. *Fidelity & Deposit Co. of Maryland v. U.S. to Use of Smoot*, 187 U.S. 315 (1902); *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

CONCLUSION

Unlike a decision based on a bright-line rule, the result below rests upon a discretionary, fact-specific determination in an area that must remain intrinsically discretionary. That fact determination — not the semantics of the Federal Rules — decided this case. The circuits are aligned in their treatment of such baseless expert testimony. Petitioners urge an unnecessary semantic investigation that is also premature pending the possible amendment of Rule 702. The result below was plainly correct both on the alternate grounds attacked by Petitioners and on the primary grounds they do not address. The petition for certiorari should be denied.

Respectfully submitted,

CLIFTON T. HUTCHINSON
Counsel of Record
HUGHES & LUCE, L.L.P.
1717 Main Street, Suite 2800
Dallas, Texas 75201